



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MTS Systems Corporation

File: B-238137

Date: April 27, 1990

Paul G. Dembling, Esq., Schnader, Harrison, Segal & Lewis, for the protester.
Clifford W. Smith, for Hydraudyne Systems and Engineering B.V., an interested party.
Craig Hodge, Esq., Office of Command Counsel, Army Materiel Command, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation erroneously indicated that competition was restricted to domestic sources, award to a foreign source was improper since it prejudiced domestic source that relied on restriction in preparing its proposal and foreign sources other than awardee that may have submitted offers in the absence of restriction.

DECISION

MTS Systems Corporation protests the award of a contract to Hydraudyne Systems and Engineering B.V. under request for proposals (RFP) No. DAAD05-89-R-0161, issued by the Army for a recoil system exerciser.^{1/} MTS argues that Hydraudyne, a Dutch firm, is ineligible for award since the solicitation was restricted to domestic sources.

We sustain the protest.

The solicitation included four basic line items for the recoil system, training, data, a warranty/maintenance agreement and eight option line items. Award was to be based on the best overall proposal with consideration given

^{1/} This system duplicates the forces produced by an artillery piece firing live ammunition without the noise and cost of live ammunition.

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to technical, price and management factors with technical more important than management and technical and management concerns significantly more important than price. The solicitation also included in section M, "Evaluation Factors For Award," the following provision: "DOMESTIC SOURCE RESTRICTION (DFARS § 52.214-7001) (Aug. 1987) is hereby incorporated by reference." The referenced Department of Defense Federal Acquisition Regulation Supplement (DFARS) provision states:

"DOMESTIC SOURCE RESTRICTION (Aug. 1987) This solicitation is restricted to domestic sources under the authority of FAR 6.302-3. Accordingly, foreign sources, except Canadian sources, are not eligible for award."^{2/}

Only MTS and Hydraudyne submitted offers. Although the solicitation contemplated fixed-price offers, MTS submitted a cost-plus-fixed-fee offer. During discussions the Army orally informed both firms that fixed-price and cost-type proposals would be considered.

Hydraudyne submitted a fixed-price best and final offer (BAFO) of \$6,677,000, while MTS' cost-type BAFO was \$6,693,861. As a result of the technical and management evaluation, both proposals were rated acceptable and substantially equal. The Army reports that since the two proposals were considered technically equal and price or cost became the determinative factor for award, the contract was awarded to Hydraudyne because its lower fixed-price offer was considered more advantageous to the government.

MTS argues that it believed as a result of the domestic source restriction in the solicitation that offers from foreign firms would not be considered. According to the protester, since Hydraudyne is a foreign firm and not eligible for award, the contract should be terminated and award made to MTS, the only qualified offeror under the express terms of the solicitation. Alternatively, MTS maintains that the solicitation should be amended to eliminate the prohibition on foreign competition and a "new round of offers" solicited.

In response, the Army reports that the domestic source restriction was erroneously included in the RFP and that MTS should not have been misled because the restriction was inconsistent with numerous other solicitation references to

^{2/} This clause has been renumbered as § 252.214-7001. See DFARS § 201.104-2 (1988 ed.).

the Buy American Act, the Balance of Payments Program and Qualifying Country Sources which should have reasonably indicated that the agency would consider foreign offers. The Army also notes that the referenced domestic source restriction, DFARS clause § 52.214-7001, cited as authority for the restriction Federal Acquisition Regulation (FAR) § 6.302-3, permits less than full and open competition when it is necessary to award a contract to a particular source or sources in order to maintain a facility, manufacturer or supplier available in case of national emergency or to achieve industrial mobilization. See 10 U.S.C. § 2304(c)(3) (1988). According to the Army, the domestic source restriction was obviously included in the solicitation erroneously since it would not be reasonable to protect a mobilization base by purchasing a single recoil exerciser. Thus, the Army maintains that any reliance by MTS on the domestic source restriction was unreasonable.

The Army also argues that MTS should have been aware that Hydraudyne was a competitor since only MTS and Hydraudyne attended a preproposal conference on the solicitation. The agency further argues that two amendments to the solicitation which memorialized this conference contained references to a "Dutch recoil system tester" and a "dynamic recoil simulator in Holland." According to the Army, under these circumstances, the only reasonable conclusion was that foreign sources would be considered and, if MTS thought otherwise, it should have raised the issue with the Army. Further, the Army argues that the protest is untimely as a result of MTS' failure to do so. Finally, according to the Army, even if MTS did not realize that foreign competition was allowed under the solicitation, the protest should be denied because MTS was not prejudiced by the domestic source restriction.

It is fundamental that once an evaluation scheme is announced and proposals are solicited on that basis, an agency is not free to evaluate proposals on some other basis. McCotter Motors, Inc., B-214081.2, Nov. 19, 1984, 84-2 CPD ¶ 539, aff'd, Wheeler Brothers, Inc.; Defense Logistics Agency--Request for Recon., B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388. Here, we believe that MTS was justified in taking the domestic source restriction at face value, as indicating that foreign sources could not compete under the solicitation. First, with respect to the presence of Hydraudyne at the preproposal conference and the mention of Dutch equipment in the amendments memorializing that conference, as MTS explains, interest expressed in the early stages of the procurement by Hydraudyne did not necessarily indicate that it would submit a proposal and, in the face of the solicitation provision clearly excluding foreign

sources, did not indicate that the Army would consider such a proposal if submitted. Further, provisions in the solicitation relating to the Buy American Act, Balance of Payments and Qualifying Country Sources, which generally provide preferences for domestic end products over foreign end products, see FAR Part 25, are standard clauses in many solicitations whether applicable or not. In any event, although those provisions are not necessary in a solicitation restricted to domestic sources, they do not directly conflict with the clearly stated domestic source restriction.

Given the unmistakable language of the restriction and the fact that the restriction was advantageous to a domestic source like MTS, without a clear indication that the restriction would be ignored, MTS was not obligated to question whether the restriction would be applied.^{3/} Further, the protest is timely since we do not require prospective protesters to file "defensive" protests before actual knowledge that a basis of protest exists or in anticipation of improper actions by the contracting agency. Mine Safety Appliances Co., B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127. In this respect, MTS was not required to assume that the Army would ignore the domestic source restriction and file a protest on that basis.

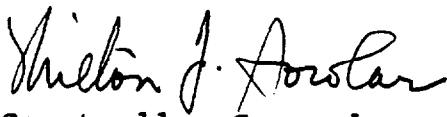
The Army, nonetheless, argues that MTS was not prejudiced by the domestic source restriction because there is no evidence that MTS would have changed its offer had it known that foreign sources could compete under the solicitation. The

^{3/} Although the Army argues that MTS could not reasonably have believed that the purchase of a single recoil system exerciser would be subject to limited competition for mobilization base purposes, the authority for the restriction here, FAR § 6.302-3, allows the use of other than full and open competition to "[c]reate or maintain the required domestic capability for production of critical supplies by limiting competition to items manufactured in the United States or the United States and Canada." FAR § 6.302-3(b)(v). The agency does not explain why it would be unreasonable for an offeror to believe that this expensive and complex military item could be the subject of a mobilization base exemption. In any event, even if the item normally would not be a mobilization base item, we do not think a firm has the obligation to inquire into the agency's clear use of a mobilization base clause given the very broad discretion agencies possess in connection with determining their mobilization base needs. See Carolina Parachute Corp., B-236153, Nov. 16, 1989, 89-2 CPD ¶ 466.

Army argues that both firms received the same treatment and competed on an equal basis and that MTS contended during negotiations that the costs and fee it finally proposed were the best it could offer. According to MTS, had it known that foreign source offers would be considered, due to the different costs of foreign supplies, foreign government economic subsidies, currency valuations favoring certain foreign companies and other factors peculiar to foreign defense contractors, it would have reassessed the level of competition under the solicitation and recalculated its offer.

We have no basis to challenge MTS' assertion that the eligibility of foreign firms would have presented it with a different competitive environment. Also, it is possible that foreign firms other than Hydraudyne relied on the restriction and declined to submit proposals. In these circumstances, we are not willing to conclude that there was no prejudice based only on the Army's speculation that proposals would not have changed materially had the RFP not included the domestic source restriction. See Ssangyong Constr. Co., Ltd., B-225947.3, Aug. 20, 1987, 87-2 CPD ¶ 183. Accordingly, we sustain the protest and recommend that the Army resolicit the requirement without the domestic source restriction and if the successful offeror is other than Hydraudyne terminate for convenience the contract with that firm. We so recommend because we believe that although prices have been exposed, the risk of an auction is secondary to the need to assure that a contract is awarded based on true competition on an equal basis. Cubic Corp.-- Request for Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174; Sperry Corp., 65 Comp. Gen. 715 (1986), 86-2 CPD ¶ 48. We also find that MTS is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.


Acting Comptroller General
of the United States